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## NOTES

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### WASHINGTON NOTES

#### THE NEW REVENUE ACT

The action of Congress in adopting just at the close of the session (passed by the House February 1, and by the Senate February 28 [H.R. 20573]) the so-called "Revenue" bill, marks another definite stage in the development of the new system of taxation necessitated by the actual and prospective outlay for national defense. The Revenue act provides, first, for a "special preparedness fund" consisting of the excess-profits tax and one-third of the inheritance tax now authorized, and in addition \$175,000,000 annually, this latter sum to be drawn from the proceeds of the taxes provided for in the act of September 8, 1916. As means of obtaining these new resources, provision is made, first, for an "excess-profit tax," which amounts to 8 per cent upon the net incomes of all corporations over and above \$5,000 plus 8 per cent of the capital invested. This is equivalent to a special increase in the income tax applicable to corporations, and carries farther the principle underlying the doubled rate on individual incomes imposed during the past summer. Next, provision is made for an inheritance tax, progressive in character, and rising from  $1\frac{1}{2}$  per cent of estates not in excess of \$50,000, to 15 per cent of the amounts of estates in excess in any one case of \$5,000,000, the rate being elaborately graded between these limits. The senate form of the measure made provision for a special tax on oleomargarine in lieu of the existing taxes. The present tax being one-fourth of 1 per cent per pound on uncolored, and ten cents per pound on colored oleomargarine, the new tax was fixed at a flat rate of two cents per pound. This provision, however, at the last moment was dropped by adverse vote on the floor. In addition to the provisions for new taxation the new act authorizes the Secretary of the Treasury to borrow \$300,000,000 on one-year certificates of indebtedness; and further authorizes bonds to the sum of \$100,000,000 to be applied to certain special purposes—the maintenance of order on the Mexican frontier, the construction of an armor-plate plant, the purchase of the Danish West Indies, and others. The Senate draft likewise authorized about \$64,000,000 of bonds to be used in redeeming and refunding certain outstanding securities shortly to mature—a provision discarded together with the oleomargarine tax. It is believed by some that the total yield of the new

revenue provisions will largely cover the estimated deficit of some \$300,000,000 for the next fiscal year. This of course is an estimate only, and, while a certain degree of accuracy is possible in so far as that estimate relates to the incomes of corporations, owing to the fact that complete income returns are now at hand, it is difficult to forecast with any degree of exactness the yield from the other classes of taxation provided for.

The striking aspect of the new tax measure is found in the circumstance that it apparently represents a definite adherence on the part of the federal government to direct taxation along lines that are already being followed by the states as the main avenue through which their current means of support are to be obtained. It is true that the income tax, both corporate and individual, has now been on the statute books for some three years, and that in other particulars direct taxation has been employed since the present national crisis developed and upon former occasions of emergency or trouble. Nevertheless, there has always been the belief in most quarters that these taxes would not constitute a permanent feature of federal finance, perhaps with the exception of the income tax, but that eventually there would be a recurrence to indirect taxation. While it is of course true that a change of administration at some time in the future may result in such an alteration of policy as is thus contemplated, it is also true that no such change will occur for four years to come, and that—more important than this—the country is apparently placing itself upon a new and very much higher level of expenditure. Unless general world-disarmament should come at the close of the European war, there seems little reason to expect a very great lessening of federal expenditure for military and naval purposes.

If it be supposed, therefore, that the federal government has definitely committed itself to a fairly large program of direct taxation, in most of the states will necessarily recur the question how to readjust their own taxes accordingly. The present program seems to suggest considerable danger of duplication and danger of injustice, conditions which in all such cases inevitably injure the tax-producing power of the community, beside leading to a growth of dissatisfaction among contributors. Moreover, the question is certain to become acute whether all grades of government can be considered warranted in the attempt to obtain the bulk of their incomes through direct taxation, particularly when so large an extension is made in income taxation as to allow many persons of substantial incomes to escape entirely, or almost entirely. There thus seems to be reason for expecting even a worse confusion of tax legislation in the

United States than has heretofore exhibited itself, and this probably without any intent on the part of legislators to bring about such a condition. As is well known, there has never been in federal finance any well-organized or farsighted program of fiscal management, although for years past the need of such a program has been frequently urged. Committees of Congress have acted in emergencies upon the basis of expediency, arranging to get what they could by the least troublesome method. The states meanwhile, as is well known, are largely cut off from indirect sources of taxation, owing to constitutional limitations upon their power, and this represents a situation which can be corrected only through the employment by the federal government of indirect taxation as a make-weight or offset, its direct taxes being adjusted to those of the states in such a way as to leave the field as nearly free as possible for the latter.

Conditions of this kind are not easy to bring to public attention in a prompt and effective way, while the lack of harmony and uniformity on the part of state legislatures is too well known to require more than passing notice. In the absence of some new method of bringing about the adoption of a general program for the readjustment of taxation and its division on equitable lines between national, state, county, and municipal governments, there is but too much reason to fear the development of even more conflicting and unsatisfactory conditions in this regard than have been characteristic heretofore.

#### THE "ADAMSON LAW" DECISION

On March 19 the Federal Supreme Court handed down a decision with reference to the constitutionality of the so-called "Adamson law" which in some aspects may be regarded as probably the most far-reaching of recent decisions with reference to the power of Congress to intervene between capital and labor, and to fix wages and conditions of employment. So recent is the controversy between the railroad managers and the labor unions, out of which grew the Adamson law in the summer of 1916, that only a brief résumé of the facts is necessary.

Two systems were in force, in March, 1916, concerning wages of railroad employees: one, an eight-hour standard of work and wages with additional pay for overtime, controlling about 15 per cent of the railroads; the other, a stated mileage task of 100 miles to be performed during ten hours with extra pay for any excess, in effect on about 85 per cent of the roads. The organization representing the employees of the railroads in that month made a formal demand on the employers that

as to all engaged in the movement of trains except passenger trains the 100-mile task be fixed for eight hours, provided that it was not so done as to lower wages and provided that an extra allowance for overtime calculated by the minute at one and one-half times the rate of the regular hours service be established. The demand made this standard obligatory on the railroads but optional on the employees, as it left the right to the employees to retain their existing system on any particular road if they elected to do so.

The employers refused the demand and the employees through their organizations by concert of action took the steps to call a general strike of all railroad employees throughout the whole country.

The President of the United States invited a conference between the parties. He proposed arbitration. The employers agreed to it and the employees rejected it. The President then suggested the eight-hour standard of work and wages. The employers rejected this and the employees accepted it. Before the disagreement was resolved the representatives of the employees abruptly called a general strike throughout the whole country fixed for an early day. The President, stating his efforts to relieve the situation and pointing out that no resources at law were at his disposal for compulsory arbitration, to save the commercial disaster, the property injury, and the personal suffering of all, not to say starvation, which would be brought to many among a vast body of the people if the strike was not prevented, asked Congress, first, that the eight-hour standard of work and wages be fixed by law, and, secondly, that an official body be created to observe during a reasonable time the operation of the legislation and that an explicit assurance be given that if the result of such observation established such an increased cost to the employers as justified an increased rate, the power be given to the Interstate Commerce Commission to authorize it. The adoption of the Adamson law was, as is well known, the result of the demands of labor, but employers, unready to adopt the law as it stood, brought suit against it with a view to a test in the Supreme Court before the date on which it should become effective. To expedite the final decision before that date (January, 1917), the representatives of the labor unions were dropped out, agreements essential for hastening matters were made, and it was stipulated that pending the final disposition of the cause the carriers would keep accounts of the wages which would have been earned if the statute were enforced, so as to enable their payment if the law were finally upheld. Stating its desire to co-operate with the parties in their purpose to expedite the cause, the court below briefly

announced that it was of the opinion that congress had no constitutional power to enact the statute and enjoined its enforcement.

The general opinion of the court, eliminating all of the purely legal and technical contentions raised by those who attacked the legislation on the ground of unconstitutionality, is to the effect that Congress has power in interstate trade to establish conditions and hours of labor subject only to very broad restrictions of the fundamental law. The court deals summarily with the contention that the power assumed by Congress was extra-legal, and that the statute was unworkable. It evidently regards the statute as an undesirable and unwise exercise of authority, but one as to whose constitutionality there can be little real ground for dispute. This position comes to a head in the following sentences which give the real gist of the opinion under consideration:

When it is considered that no contention is made that in any view the enforcement of the act would result in confiscation, the misconception upon which all the propositions proceed becomes apparent. Indeed in seeking to test the arguments by which the propositions are sought to be supported we are of opinion that it is evident that in substance they assert not that no legislative judgment was exercised, but that in enacting the statute there was an unwise exertion of legislative power begotten either from some misconception or some mistaken economic view or partiality for the rights of one disputant over the other or some unstated motive which should not have been permitted to influence action. But to state such considerations is to state also the entire want of judicial power to consider them—a view which therefore has excluded them absolutely from our mind and which impels us as a duty to say that we have not in the slightest degree passed upon them. While it is a truism to say that the duty to enforce the Constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to influence our opinion or to control judgment.

The assertion that the act was unworkable is stigmatized as without merit, since there is no reason to doubt that if a candid effort should be made to apply it, the result would without difficulty be accomplished. "It is true," says the court, "that it might follow that in some cases because of particular terms of employment or exceptional surroundings some change might be necessary, but these exceptions afford no ground for holding the act void because its provisions are not susceptible in practice of being carried out."

This decision is rendered by a five-to-four verdict—a kind of victory for the trades unions which leaves the whole question really open to

adjudication at some future time, although settling it for the time being. Some of the most interesting and informative discussion of the law in controversy is found in the dissenting opinions which have been filed by the minority justices. It is worth noting that perhaps the most influential considerations in the minds of these dissenters are the apparent possibilities that are suggested by the doctrines laid down in the majority opinion. Among those which have thus evidently been discussed by the members of the court without reaching any community of thought are the questions whether Congress may theoretically fix maximum and minimum wages, pass compulsory arbitration laws, or place railroad employees on a basis equivalent to that of military service on the ground that they are engaged in a business vested with a public quality.

#### A SHIPPING SUBSIDY DISCARDED

An opinion throwing further light upon the interpretation of the so-called "most-favored-nation clause" in commercial treaties, which has figured so largely within recent years in the development of the foreign trade policy of the United States, is that just handed down by the Federal Supreme Court in the case of *The United States, Petitioner, v. various mercantile concerns* (Nos. 149-62, October Term, 1916). The history of the litigation has been a long one, lasting ever since a period shortly after the enactment of the Underwood tariff law in 1913. In that law it was provided "that a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." The object of this provision was confessedly that of encouraging the development of an American merchant marine, the opinion being that the reduction of 5 per centum in the tariff on goods imported in American bottoms would enable such bottoms to exact a somewhat higher freight rate than would otherwise have been possible. At the time of the enactment of the law, there were hardly any American vessels engaged in trans-oceanic trade, so that the provision would in any event have been almost a dead letter for some time to come, if interpreted in the sense in which its framers intended. It was, however, almost immediately urged by attorneys representing importers that under our reciprocity treaties embodying the so-called "most-favored-nation clause" it would be necessary to give to the vessels

of other nations enjoying the benefits of that clause the same advantages that were accorded to vessels of the United States. This would have amounted to allowing the discount of 5 per centum upon all goods imported in the vessels of any country enjoying a most-favored-nation relationship with the United States. Among such countries were Belgium, Holland, Great Britain, Austria, Germany, Italy, Spain, and Japan. The case eventually went to the Court of Customs Appeals, and that court held that the provision of the law already quoted applied, not only to merchandise imported in American ships, but to that which was imported in the ships of the other nations referred to. Such a decision would have necessitated refunds amounting to many millions of dollars, from which the consumer would have received no benefit whatever, the goods affected having been long ago sold to him and used up, so that the refund would have been practically nothing more than a subsidy to a very small class of importers. Hence the decision to carry the case beyond the Court of Customs Appeals to the Federal Supreme Court. That court now holds that the decision of the Court of Customs Appeals was in error. In announcing this conclusion the court says:

We have a clear opinion as to what the subsection means if the words are taken in their natural, straightforward, and literal sense. It grants a discount only to goods imported in vessels registered under the laws of the United States, and conditions even that grant upon its not affecting treaties. There is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent, in order to universalize a grant that purports to be made to a single class, and to do so notwithstanding the express requirement of the statute that specified rates should be paid. Nobody would express such an intent in such words unless in a contest of opposing interests where the two sides both hoped to profit by an ambiguous phrase. But the section is not ambiguous on its face, and there is no sufficient ground for creating an ambiguity from without, when it is considered that the purpose to favor American shipping was the manifest inducement for putting the subsection in.

An interesting *obiter dictum* in the decision is found in the statement that "without going into nice calculations the benefit to American shipping of such a general discount would be at least problematical." The opinion of many persons has been that, even with the interpretation given to the clause by the Supreme Court, the benefits to American shipping will still be very small. Meanwhile, however, the European war and the immense change in conditions incident to the struggle have

entirely altered the aspect of affairs, so that today the growth of our registered tonnage is far in excess of anything that could have been expected as the result of a concealed subsidy of this kind. If relationships with foreign countries were normal, we might expect to be obliged to readjust our reciprocity relations with the countries enjoying the most-favored-nation treatment in consequence of this decision, as they would almost certainly insist upon a different view of the case from that which is now presented as authoritative. In this case, as in that of the LaFollette seaman's act, world-wide changes have come in to mask the international aspect of legislation which would otherwise almost certainly have caused serious diplomatic interchanges. When commercial relationships are readjusted after the close of the European war, this decision of the Supreme Court will undoubtedly have a significant bearing upon the interpretation given to, and consequently necessary modification of, the most-favored-nation clause. American ideas with reference to that clause have always, as is well known, differed widely from those of European statesmen, and the present decision will tend to broaden such differences of view.

#### POLICY AS TO FOREIGN LOANS

The Federal Reserve Board has issued (statement of March 8, 1917) what is probably the most positive definition of the attitude of the United States governmental authorities toward foreign loans that has yet been given to the public. This question has passed through several varying stages since the beginning of the European war. Shortly after President Wilson's original proclamation of neutrality, effort was made in various public quarters to discourage the floating of foreign loans in the United States. Subsequently this attitude was changed, and the loans were allowed to be offered practically with neither interference nor encouragement on the part of the government. Late in 1916 it appeared that considerable quantities of short-term bills were about to be offered on the market and that as a result the holdings of the banks, already large, might be considerably added to, under the impression that these bills were really paper maturing at an early date. It was with a view of cautioning the banks against investments undertaken on such a basis that the Board on November 28 issued the so-called "warning" which has been a staple of discussion in financial circles since that time. In this warning the view was taken that banks should not invest their funds in paper technically short term, which was really to be paid only on the basis of steady and constant renewals. The

statement further contained an *obiter dictum* to the effect that even the investor ought not to purchase foreign securities without informing himself carefully on the conditions of their issue. There has been a considerable degree of misunderstanding concerning the meaning of this statement ever since its issue, and hence the attempt at the present time to bring about a more correct comprehension of the Board's point of view in the matter.

In the statement of March 8 the Board now says:

The Board has already stated that its announcement of November 28, 1916, did not deal with the finances or the credit of any particular country, but only with the banking principle which it seemed desirable to emphasize under the conditions existing at that time. The objection then made by the Board was to the undue employment by our banks of their funds in the purchase of foreign loans and not to the merits of foreign loans as investments. The Board was then, and is now, of the opinion that the liquid condition of our banks should not be impaired through undue or unwise use of their resources for investment operations. The position of the Board with respect to this principle has not changed. It still takes the view that foreign borrowings should appeal primarily to the investor and not involve the use of banking resources beyond the limits of sound practice. In view, however, of existing conditions, especially as they affect our foreign trade, the Board deems it desirable and in the public interest to remove any misconception that may be left in the minds of those who read the statement issued on the 28th of November, 1916. Since that date the country's gold reserve has been further materially strengthened and supplies a broad basis for additional credit. The Board considers that banks may perform a useful service in facilitating the distribution of investments, and in carrying out this process they may, with advantage, invest a reasonable amount of their resources in foreign securities. So long as this does not lead to an excessive tying up of funds and does not interfere with the liquid condition of the banks, there cannot be any objection to this course.

The position thus assumed is evidently being accepted as the definitive attitude of the public authorities charged with the regulation of banking, and may apparently be taken as terminating the process by which our attitude as to foreign financing in American markets has been gradually developed.

#### THE SOUTH AFRICAN STEAMSHIP CASE

The Federal Supreme Court handed down on March 16, 1917, an important opinion in the case of *Thomsen and others v. Cayser and others*, relating to the so-called South African Steamship Conference, which carries still further the doctrine already laid down in former decisions

with reference to combinations between freight-carrying lines in foreign trade. The case in question relates to the methods employed by the South African steamship lines plying between New York and South African ports whereby certain discriminations in freight were made for the purpose of controlling trade. The lines involved promised to pay shippers of goods 10 per cent upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to January 31 and July 31 in each year and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly had not made or had not been interested in any shipments by other vessels. This commission was not payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those dispatched by the combining lines. By reason of the arrangements thus established, shippers were compelled to submit to hardship and inconvenience and to pay higher rates to such an extent as to leave in the possession of the steamship conference at the time this suit was brought about \$1,500,000.

The case had been extensively argued in the lower courts, and at the first trial it was held that the testimony did not establish that the combination was an unreasonable restraint of trade. Subsequently the case went to the Circuit Court of Appeals, and it was there held that whether the restraint was reasonable or unreasonable was immaterial under the decisions of Federal courts. It was likewise immaterial whether the combination was entered into before or after plaintiffs commenced business, the anti-trust statute applying to continuing combinations; or whether the combination was formed in a foreign country, as it affected the foreign commerce of this country and was put into operation here. And as the plaintiffs had alleged damage, the court decided that they were entitled to an opportunity to prove it, and so remanded the case to the Circuit Court.

Upon the second appeal the court declared a change of view, saying: "When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial," and that it was "also apparent from the record that the Circuit Court upon the second trial, in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law." Finally, it was

held that in the light of the recent decisions of the Supreme Court in the Standard Oil and Tobacco cases, the construction placed upon the statute by the District Court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, the lower court can now determine the legality of the combination.

The court then said that it was impossible to hold that the record disclosed a combination in unreasonable restraint of trade, but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to dismiss; that as the plaintiffs had presented their case in view of the decision of the court that the reasonableness of the restraint was immaterial, it would be unjust to them to dismiss the complaint because their proof did not conform to another standard, and that upon another trial the plaintiffs might be able to "produce additional testimony tending to make out a case within the Supreme Court decisions referred to." Accordingly the court remanded the case for a new trial.

In the present finding the Supreme Court strongly upholds the view that the steamship combination is illegal, pointing out that a combination is not excused because it was induced by good motives or produced good results, while it shows that the combination was unquestionably intended to prevent competition. There was nothing in the trade which required a restraint upon shippers, or the adoption of extreme methods to shut out competing vessels. A definite monopoly was established, the shippers being constrained by their own necessities to use the combined lines and competitors being kept off by the maintenance of so-called "fighting ships," which would cut rates to a point where no competitor could survive. On these grounds and others it is therefore held that the steamship conference in question was a monopoly in view of the Sherman Anti-Trust act, and the decision of the Circuit Court of Appeals dismissing the case is, therefore, reversed. The decision arrived at is likely to be of substantial significance as applying doctrines laid down some years ago in the Standard Oil and Tobacco cases. While all foreign shipping is, at present, subject to unprecedented disturbance and being operated under conditions which permit unusual profits as the result of the European war, these ship decisions of the Supreme Court do not have the immediate bearing and vitality that they would otherwise possess in influencing the direction of our ocean trade. They are, however, inevitably laying the foundation of a body of precedents that will be of very broad significance when the shipping business is reorganized, as it will necessarily be after the conclusion of the war.